



POLICE DEPARTMENT

August 28, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Hailyn Olivares
Tax Registry No. 939143
72 Precinct
Disciplinary Case No. 2010-3105

The above named member of the Department appeared before the Court on May 4, 2012, charged with the following:

1. Said Police Officer Hailyn Olivares, while off-duty, on or about July 6, 2010 at approximately 6:00 pm, in Kings County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer did state the following, in sum and substance, to Person A: "I'M GOING TO GIVE YOU A BEAT DOWN IN FRONT OF YOUR FRIEND."

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT GENERAL REGULATIONS

2. Said Police Officer Hailyn Olivares, while off-duty, on or about July 6, 2010 at approximately 6:00 pm, in Kings County, while off-duty, having been involved in a police incident, did thereafter fail to promptly notify the patrol supervisor, precinct of occurrence, as required.

P.G. 212-32, Page 1, Paragraph 2 OFF DUTY INCIDENTS INVOLVING
UNIFORMED MEMBERS OF THE SERVICE

The Department was represented by Rita Bieniewicz, Esq., Department Advocate's Office. Respondent was represented by Michael Martinez, Esq., Worth Longworth & London, LLP.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Archie DePietro as a witness.

Sergeant Archie DePietro

DePietro was assigned to Patrol Borough Brooklyn South Investigations Unit. In July 2010, he investigated a domestic incident concerning Respondent. DePietro inherited the case from others. The allegation was that on July 6, 2010, at approximately 1800 hours, a dispute occurred between Respondent and Person A stemming from the arrest of an individual named Person B. Person B had been in "some kind of relationship" with Person A. At one point, Person B contacted her and told her, "[Y]ou better see me or else." Person A "was basically being harassed" and stalked by him. Person B was arrested near "their residence."

Allegedly, after the arrest, Respondent and Person A "had some discussion regarding that arrest, that incident." Respondent had been informed by that time that Person B had said he was in a sexual relationship with Person A.

DePietro testified that later that night, Person A walked into the 106 Precinct station house and made a complaint to the police. The original log recorded Person A alleging that Respondent “was gonna give her a beat down.” He also allegedly pushed her.

Person A also gave a statement in the form of a domestic incident report (DIR) (Department’s Exhibit [DX] 1). The copy of the DIR in evidence was computerized. In it, Person A alleged:

Hailyn came to Person C house because he wanted to speak to me about what had happen earlier with a co-worker that was harassing me. I did not want to talk to him because he was very upset. If we did talk I told him lets talk in Person C house. . . . He told Person C watch my kids I am taking Person A home I want to speak to he in my house. I put me in his car, I got out, then he put me again. I got out again I was so scared for my life then he said OK lets talk in Person C house. When he was walking he told me I going to kick your ass in front of your friends. I ran next to his car then he try to came near me and I ran to an ice cream truck near by. . . . I was hiding for about 30 mins when my friend came back she said he was gone and took my kids with him I don’t want to go home because he is very violate man, he does not know how to control his angry. I scared of him [all as in original but all-capitals changed to standard form].

DePietro interviewed Person A, her friend Person C, and Respondent as part of the investigation.

Telephone Interview of Person C (see DX 2, transcript)

[The Advocate stated that the recording of Person C’s interview had been damaged and did not work. The transcript begins in the midst of the conversation].

Person C indicated that when she tried to contact Person A by telephone, she reached Respondent. He cursed at her and yelled, “you know, you don’t know what I could do to you, don’t you fucking call this house anymore, I could hurt you, stay away from her, stay away from me.” Person C hung up the phone.

Person C stated that Respondent was “not really stable” and she was “really scared” of him. When she saw him she walked the other way. She wanted nothing to do with him.

Person C agreed that Person A and Respondent met at Person C's house because Respondent was under the impression that Person A and Person B were in a relationship. Respondent was mad about that and Person A was scared to "be with him."

Person B, Person C indicated, could not use Person A's phone because Respondent "was crazy." Instead, Person B called Person C and told her, in sum and substance, to tell Person A "she better meet me somewhere or she's going to have to deal with my consequences." According to Person C, Person A had ended the relationship, but Person B would not take no for an answer and "was like going crazy on her." He also had threatened to tell Respondent.

Person C told Person A to "just come clean," tell Respondent and "end this madness." Person C felt that Person B was going to hurt Person A.

Person C told the investigator that Respondent ran out of the house, but "started pushing [PersonA] to the car." Every time that Respondent "puts her in the car and then he walk the other way to in the driver's seat," Person A opened the door and ran. He then "grabs her again and puts her back in the car." When asked, "And he made that statement, I'm going to give her a beat down in front of her friends,?," Person C responded, "I'm going to beat you, yeah." Respondent said this in English and Spanish. He was "going ballistic."

Person C claimed that she saw Respondent pull "something like black" out of his "back." She could not say what it was, but thought at the time that it was a gun. She got scared and ran.

Person C stated that Respondent told Person A, "[Y]ou better come back," but she ran and "disappeared," hiding in "an ice cream truck or something." When the investigator followed up, Person C said, "She did, she ran – she lost her suit even when she was running, and then she ended up – an ice cream truck." That was the entire incident "nothing was said more than what happened or even less." Then, Person C added, Respondent told Person A "she better come home,

cooking and cleaning, and taking my shoes off, or she's going to be in a big trouble, and she knows I could beat her up, I could do this, I could do that."

Person C asserted that Person A "really basically told me, if I have anything not to say anything," because it was not her problem. Person C should "say what happened. You don't say anything else." Person C added that Respondent told Person A never to speak to her again. Person C then "made it clear that if he doesn't approve you sticking to me I really don't want to have anything to do with this whole situation." There were other witnesses to the incident but they did not want to get involved "because they really know that was such of a mess."

Person C added that Respondent once told her, "[D]on't forget I'm a cop, I could get you in trouble."

* * *

DePietro stated that Respondent did not call a patrol supervisor or remain on the scene after the dispute.

Respondent's interview was on August 20, 2010. Respondent handed DiPietro a letter during the interview, i.e., the letter written by Person A admitted as Respondent's Exhibit (RX) A. In the letter, dated July 27, 2010, Person A said:

I . . . made a statement to the police dept. regarding Hailyn A. Olivares this statement was not true. The reason why I was scared was because I was having another relationship with a man. And this man was going to tell Respondent. I went to the police dept. because I wanted to pick up my kids and did not want to see Respondent because of what I did. I made a false statement. I need to fix this. Please call me at [telephone number provided] [some grammar and capitalization emended].

DePietro asked Respondent why he was handing him the letter rather than Person A making contact. Respondent said that Person A had tried to contact the 106 Precinct and was unsure of who the investigator was. Thus, Person A gave the letter to Respondent for Respondent to give to DePietro, as "he was scheduled to come see me."

Respondent told DePietro that Person A had relocated to Texas. DePietro called Person A instead, shortly after interviewing Respondent. Person A agreed that she actually wrote the letter. She denied that Respondent coached her or told her that she needed to write it to get him off the hook, saying that she wrote it of her own free will. When DePietro asked why she did not send it to him directly, she said that she had called the 106 Precinct but all they could tell her was that the case was being investigated. No other information was available, so Person A gave the letter to Respondent.

On cross examination, DePietro testified that the DIR was prepared at 2320 hours. The call out to the Internal Affairs Bureau (IAB) was slightly earlier, at 2251. The call-out probably was made by the commanding officer, so Person A must have arrived earlier than that in order for her complaint to make its way to him. Respondent was not arrested. There was no physical injury.

Investigators called Respondent on the night of the incident and notified him to respond. His duty status was changed that night. No order of protection was issued.

DePietro testified that Respondent denied the allegation during his interview. He told DePietro "what really happened," saying that that he went to try and talk to Person A. Person A was about to get into the car, then said, "I can't do this," and walked out. She did not want to talk, so Respondent took the children, who were in Person C's basement, to a New York Mets game.

DePietro testified that Respondent referred to Person C as a "facilitator" of the relationship between Person A and Person B. All three worked together in a warehouse. Person C went with Person A to make the original report against Respondent.

DePietro did not make any efforts to see Person C in person. He was under the impression that she was outside when the alleged threat was made, but he was basing that on her statement that she heard what was happening.

DePietro could not say whether Person C's claim that Respondent pushed Person A meant that he was trying to prevent her from leaving.

After speaking to Person A, DePietro mailed the formal complaint withdrawal form to her in Texas. He mailed it on August 25, 2010, and she signed it on September 2, 2010 (see RX B, complaint withdrawal form).

Respondent

Respondent testified that he [REDACTED] to Person A for nearly 12 years. They had two children. In 2010, the boy was five years old and the girl was six or seven. They lived in [REDACTED] a three-family house.

Respondent testified that he was working a 0705x1540 tour on July 6, 2010. Around 1310 or 1320 hours, he received a strange phone call. It was from Person C, but she was using his wife's cell phone. Respondent had seen Person C previously but did not know her. She and Person A were co workers in a warehouse or factory. They had worked together for two years, but never before this day had Person C called Respondent.

Person C told Respondent, "[O]h, there's this psycho that is bothering [Person A], that is stalking [Person A]." Respondent was confused, but Person C continued, "Person A is so nervous," adding that the perpetrator, Person B, was calling and threatening her. Person B told Person A that she and her family would suffer unless she came to meet him in the park.

Respondent "immediately" asked to speak to Person A and wanted to know where his children were. Person C told Respondent his children were there, but Person A did not want to speak to him.

Respondent testified that he "was assuming something was going on. I didn't know what but you know, something strange was going on." He told Person C to call 911 if she had not done so

already, "but if not, you know, what are you guys gonna do?" Person C said that they were at Person C's house and Respondent ascertained her address [REDACTED]. Respondent said that he would call the 106 Precinct, advised Person C to remain at home, and told her to tell Person A to be careful. He advised that everything would be all right and that they should make a police report. "That's what as a husband, as a Police Officer, as a human being, that's what I'm trying to do and that's my responsibility so that's what I told her to do."

Respondent called the 106 Precinct, said that he was a member of the service, and stated that Person A was being harassed. He asked that a sector be sent. The officer that answered, however, told Respondent that the precinct was very busy, including a 10-13. He called back in about 20 minutes, and the officer was able to send a sector.

Respondent finished his tour and went home. He got some errands done and called Person A before arriving home. She said that the police were there. This was around 1630 hours. When Respondent arrived, he saw a patrol car, Person A, and Person B. He had seen Person B "on the block" in the past, and "was assuming" he was Person A's co-worker as well.

Person A came up to Respondent and told him that Person B was crazy and was "saying all these kind of things." Respondent replied, "What are you talking about?" A male police officer approached him and said that according to Person B, Person A and Person B were having a sexual relationship. This was the first Respondent was hearing of an affair. Respondent "thought me and [Person A] was doing pretty good to be honest."

Respondent was instructed not to speak to the sergeant that was on the scene, a woman. The sergeant approached Respondent, however, and asked to speak with Person A. The sergeant also ascertained that Respondent was "Officer Olivares." She said, "I would like you to stay out of this," and told him to go home. Respondent did so, but before doing so, he directed Person A,

“When you finish with this, you come home. We have to conference.” From his house, Respondent could see Person B being placed in handcuffs.

Person A called Respondent over and told him she was going to the 106 Precinct station house. He asked if she wanted him to come with her, but she declined, telling him she did not want him to get involved. He reminded her that they had tickets to a New York Mets game that evening at Citi Field. Person A said that she would bring their children home to be with Respondent, but she did not. Around 1800 hours, when Respondent was ready to leave for the game, Person A had not come home yet.

Respondent called Person A, who said she was at Person C’s house. Person A invited him over to talk. Respondent said, “What do we have to talk about?” but Person A assured him it was about what had occurred that day. She did not admit the affair at that time. When asked, “You sort of have an idea but what’s going on in your mind at that time?” Respondent answered, “Well, I know my life was probably gonna change a little bit, meaning, you know, probably . . . she didn’t want to talk to me, maybe something funny, you know, is going on I’m gonna have to separate from [Person A] or whatever the case might be. I was not you know, thinking about anything else.” His main concern was speaking to Person A and going to the Mets game.

Respondent arrived at Person C’s house. Person A came outside and asked him if he wanted to come in. He said, “Should I?” But Person C told him she was “so sorry about what happened” and also invited him in. He agreed, but when Person A suggested they speak, he told her, “If you want to talk to me about what happened, we should go outside.” He said this because “[w]e gotta talk about our personal business in front of somebody else?”

Respondent told Person A that they should go to “the car.” She was walking of her own free will. But when she was about to get inside the car, she balked, saying, “I cannot do this.” Respondent already was sitting in the car. Person A repeated her remark twice more and “left

running.” Person C was by her own door. Respondent did not see where Person A went, including whether she returned to Person C’s home.

Respondent told Person C that he was going to take the children to the game. If Person A wanted to come home she was more than welcome, but “I expect [Person A] to be home when I get out the game.” Respondent picked up the children from Person C’s basement and they went to the game.

While at the Mets game, Respondent sent a few text messages to Person A but did not hear back from her. Person A’s sister, however, called him from Houston around 2000 or 2030 hours. Person A’s family was from Texas. Her sister wanted him to bring the children from the game back to Person C’s house, telling him that Person A did not want to come home that night. He refused.

After the game, Respondent went home with the children and put them to bed. He texted Person A, telling her that the children were asking about her, and that if she wanted to come home, she should. They did not have to talk about whatever had happened. Respondent went to sleep and did not hear back from Person A.

Later, Respondent received several voice mail messages. One was from the duty inspector, who told Respondent to call back as soon as he got the message. He called back, and the inspector told him that Person A was there with him. The inspector ordered Respondent to stop attempting to contact her. The inspector also told Respondent to come to the 106 Precinct station house.

Respondent refused to allow Person A to come home and be with the children so he could go to the precinct because he knew “[a]s a Police Officer” that he was going to be placed on modified duty. Instead, he went to the precinct, bringing the children. He was placed on modified duty and returned home, with the children. He did it that way “[b]ecause I’m a father.” If Person A “chose to go and you know to the Police Department and then she chose to go to family

court and get the kids the right way – because I knew my duty status was going to change.”

Thus, he was “not going to leave my own house.”

The next day, Person A’s sister and mother called Respondent, saying they were in New York and wanted to see the children. Respondent had no problem with this. Later that day, Person A, her sister and mother sat down with Respondent. They wanted to take the children to Texas. Respondent agreed, as long as Person A brought them back. He paid for everyone’s plane tickets, including one for his dog.

Throughout that July, Person A called Respondent and apologized. He asked what she was apologizing for. One day – Respondent believed it was July 16, 2010 – Person A “broke down” and admitted the affair with Person B. They would have relations when Respondent was at work. Person C helped, lending her car or the use of her phone.

At the request of Person A’s family, Respondent went to Texas to speak to them. He cancelled previous plans to attend a wedding in the Dominican Republic to do so. In front of everyone, Person A “said that whatever happened with Person C and Person B and everything else and why she did what she did.”

After that meeting, Person A’s family apologized to Respondent for the fact that his job had been affected, and “my family and everything was changing.” Person A told her family “that it was because she was afraid of me. That was her story. When in fact, she was doing something else that was not normal, and it came back all to her and she was, you know, feeling sorry.” Respondent told her that she did not need to get involved further because “[t]he Department is handling whatever.” But the day he was to return, she wrote the RX A letter and placed it in his luggage. Person A knew that Respondent’s official Department interview was approaching and told him, “Handle this.”

Person A returned around August 13, 2010. At the time of trial, Respondent and Person A were “separated” but lived together.

On cross examination, Respondent admitted that it bothered him when one of the officers at the scene of Person B’s arrest told him that Person B and Person A were having an affair.

Respondent contended that when he arrived at Person C’s house, Person A was waiting for him outside. He then said that she was coming out as he was arriving.

Respondent did not do anything after Person A walked away other than talk to Person C.

At the time of the incident, Person A had been unemployed from the warehouse for about two months. She was planning to seek employment in Texas, as her parents would be able to help with the children.

FINDINGS AND ANALYSIS

Introduction

Respondent is charged with threatening Person A during a domestic argument. He was at work on July 6, 2010, performing a day tour. While at work, he received a telephone call from Person C, whom he knew as a friend of Person A. Person C told Respondent that a man was harassing Person A, but that Person A did not want to talk to Respondent about it because she was scared. Respondent told Person C that if someone was harassing Person A, they should call 911. He was suspicious and confused, but finished his tour. He was planning on taking his young children to a Mets game that evening.

When Respondent arrived home, within the confines of the 106 Precinct, the police were there. The man that was harassing Person A, identified as her co-worker, Person B, was in custody. Person A and Person C also were present. A male police officer informed Respondent that Person B and

Person A were having an extramarital affair. A sergeant instructed Respondent to enter his residence, which he did.

When the police left, Person A and Person C went to Person C's house. The Department alleged that Respondent pushed Person A from the house and forcibly brought her to his car. There, he told her, in sum and substance, "I'm going to give you a beatdown in front of your friend," i.e., Person C. Person A was able to leave and ran to a nearby ice cream truck.

Respondent agreed that he wanted to speak to Person A about the matter. He denied getting into a physical altercation with her or threatening her. He said that she came outside to speak with him, but decided she could not do it and left. Respondent took his children and went with them to the Mets game.

Specification No. 1

The first specification charges Respondent with threatening Person A as follows: "I'm going to give you a beat down in front of your friend."

Originally, Person A and Person C went to the 106 Precinct station house on the night of the incident and asserted that Respondent pulled her into his vehicle and threatened her. Person A later recanted this allegation, however, in a letter to investigators dated July 27, 2010. She also filled out the formal "complaint withdrawal statement" provided by the Patrol Borough Brooklyn South Investigations Unit. At trial, therefore, the Department disavowed any reliance on Person A's original complaint in its case in chief. The Advocate did not challenge Respondent's counsel's statement that there was no allegation Person A had been pressured into recanting. Person A's statements thus were admitted only as background to explain how the investigation proceeded.

Instead, the Department relied on the interview of Person C, conducted by the main investigator. She stated that she heard and witnessed the same threat.

The Department's case relies entirely on hearsay. Although hearsay is admissible in this forum, see Matter of Ayala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. The hearsay is central to the Department's case, so there is a question of basic fairness in using the hearsay to reach a finding of fact. See Case No. 77005/01, p. 6 (May 27, 2002) (hearsay declarations are insufficient to support findings of guilt in cases that pose close questions of credibility).

Person C did not appear for trial. In light of her failure to testify, her ability to have seen what she alleged to have seen cannot be tested. Moreover, the Court cannot observe her demeanor, explore possible motives to lie, or assess the credibility of her account after the test of cross-examination. Furthermore, the claim of a threat by Respondent was uncorroborated by any other evidence. Cf. Matter of Grossman v. Kralik, 217 A.D.2d 625, 626 (2d Dept. 1995) (written memorandum of non-testifying judge who saw courtroom attendant sleeping was corroborated by other testimony at hearing).

A recording of the investigator's interview with Person C could not be admitted because of a technological error. The interview was recorded onto an audio cassette tape. The Advocate stated, however, that when she played the tape, the speed was incorrect. She was unable to rectify the problem. The interview transcript was admitted into evidence, but the transcript itself picks up somewhere in the middle of the interview. It is difficult to tell about whom Person C is speaking because she also recounted the threats made by Person B. Nor can the Court examine Person C's inflection or tone of voice. This manner of proffering Person C's version of events was the best the Department could do under the circumstances, but it was far from a reliable form of hearsay. See Case No. 83945/08, pp. 13-14 (Apr. 29, 2009).

But the most glaring problem with the Department's case is that neither Person A nor Person C made an immediate complaint of this incident. Instead, they walked into the 106 Precinct station

house. The domestic incident report (DX 1) listed the time of occurrence as 1800 hours. The original call-out to IAB, made by the commanding officer of the 106 Precinct was at 2251. That leaves almost a five hour gap between the threat and the report. Person A and Person C called the police when Person B harassed Person A, resulting in what appeared to have been a very good response leading to Person B's arrest. Yet when Respondent supposedly threatened Person A, and she ran from his vehicle, hiding in an ice cream truck, for 30 minutes according to the DIR, she did not call 911.

If the incident was so upsetting, it begs the question of why Person A or Person C did not call the police when it occurred. No explanation was given for this, either in the DIR or Person C's interview. Person C simply was not asked about it. There may well be a very good explanation, but the Court is left to speculate because there is nothing in the record to explain it.

One more problem with the case is one of legal sufficiency. The Department's version of events at trial was in line with Person A's original statement. Person C mentioned other threats by Respondent, to her and to Person A. She also alleged that Respondent displayed what appeared to be a firearm. But none of this was charged, leading the Court to conclude that the Department did not have full confidence in Person C's version of events. But the Department also essentially disavowed any reliance on Person A's original statement to the police, and essentially conceded that she had not been pressured into recanting – even though Person C indicated that she might have been. If the Department is not relying on Person A, and is not relying on Person C, there is nothing upon which the Court may base a guilty finding.

As a party to the action, Respondent was an interested witness. See People v. Agosto, 73 N.Y.2d 963, 967 (1989) (criminal defendant is interested witness as a matter of law); Coleman v. New York City Transit Auth., 37 N.Y.2d 137, 142 (1975) (an actor in the transaction at bar in civil case, having motive to shield self from blame, is interested witness, even if not a party). But there are greater problems with crediting Person C's hearsay account.

The Court does not necessarily find Respondent to be the most credible witness. His testimony revealed a controlling and temperamental attitude. But that is not what he is charged with. He is charged with threatening Person A with physical harm. The Court concludes that the Department failed to prove that Respondent threatened Person A with physical harm. Accordingly, the Court finds Respondent Not Guilty of Specification No. 1.

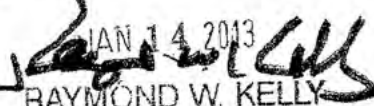
Specification No. 2

The second specification charges that Respondent, "having been involved in a police incident, did thereafter fail to promptly notify the patrol supervisor, precinct of occurrence, as required." The Court has found, with regard to Specification No. 1, that the Department failed to prove that Respondent threatened Person A. All that has been established is that Respondent attempted to speak to Person A about Person B, but she refused. That does not constitute a police incident. Accordingly, Respondent is found Not Guilty of Specification No. 2.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED
JAN 14 2013

RAYMOND W. KELLY
POLICE COMMISSIONER